

May 19, 2015



Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

RE: Notice of Proposed Rulemaking – Regulations for State Courts and Agencies in Indian Child Custody Proceedings – RIN 1076-AF25 – Federal Register (March 20, 2015)

Dear Ms. Appel:

The Children's Defense Fund (CDF) is pleased to have the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) for the regulations for state courts and agencies in Indian child custody proceedings under the Indian Child Welfare Act (ICWA) that was published in the Federal Register on March 20, 2015 (RIN 1076-AF25).

The Children's Defense Fund applauds the Bureau of Indian Affairs (BIA) for proposing these long overdue and greatly needed regulations on ICWA, as they are critically important if children are to truly benefit from the protections in ICWA. Without regulations, ICWA will continue to be misunderstood and misapplied and leave more American Indian and Alaska Native children at risk of being unnecessarily removed from their families, tribes and cultures.

CDF has been supportive of ICWA since it was enacted in 1978 to respond to the crisis affecting Indian children, families and tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families and communities and placed in non-Indian homes. Congressional testimony documented the devastating impact this was having upon Indian children, families and tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts that are adjudicating the rights of Indian children and their families.

The problems ICWA addressed while in part unique to the treatment of Indian children also had similarities to problems facing other children coming to the attention of child welfare systems across the country. In CDF's 1978 report, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care*, we singled out the special needs of American Indian children, who we noted bore a particularly heavy burden in child-placing and child welfare systems and the fact that there was not the special care needed to keep these children from being removed from their homes and culture, often permanently. With our report and subsequent advocacy, CDF was working to increase efforts to keep children safely with their families, ensure placement when necessary in the least-restrictive and most family-like setting appropriate to their needs and within reasonable proximity to their families and home communities. In fact, shortly after ICWA was passed, Congress passed the Adoption Assistance and Child Welfare Act of 1980, which applied many of the principles applied to Indian children in ICWA to all children in care.

Although progress has been made as a result of ICWA, American Indian/Alaska Native children still are at much greater risk of being removed from their families and tribes and placed in non-Indian homes. For too long these children have not had the full benefit of federal protections under ICWA that were designed to reduce their numbers in care and help maintain their identity and culture. Compliance with ICWA by states is erratic and state court decisions inconsistent. Improving ICWA implementation can only help address this long-standing concern and support the full implementation of the law that has been limited by uncertainty and inconsistent practice. There is a great need for the federal government to provide binding regulations to ensure ICWA is enforced and applied properly in all states so children and families are fully protected.

The Children's Defense Fund joined 17 other child welfare organizations as amicus curiae in *Adoptive Couple v. Baby Girl* in the U.S. Supreme Court in 2013 because we believed that in their quest for baby Veronica, the petitioners had turned their legal arguments against the Indian Child Welfare Act. CDF strongly believed that the approaches and values embodied in ICWA should inform the nation's approach to ensuring the well-being of not only American Indian children but all children. Building on our desire to help keep children safely with their families, to ensure they are in the most family-like settings appropriate within reasonable proximity to their families and community when placement is necessary, and to ensure them timely permanence, we want to reinforce the special importance of the following provisions in the proposed regulations:.

- **Requiring agencies and courts to ask in every proceeding whether a child is Indian.** This will help ensure that all American Indian/Alaska Native children are identified and accorded ICWA protections. Early identification of ICWA-eligible children will improve placement stability by preventing children from having to move to new homes once their Indian heritage has been identified. It will help ensure proper services are provided and prevent delays and repetitive court proceedings.
- **Recognizing a tribe's exclusive authority to determine tribal membership.** We are very supportive of the affirmation of this key principle of tribal sovereignty.
- **Rejecting the Existing Indian Family Exception.** Too many American Indian/Alaska Native children have been denied the protections of ICWA because of the Existing Indian Family Exception—a judicially created rule that is inconsistent with ICWA's intent. The regulations clarify what the Supreme Court in *Adoptive Couple v. Baby Girl* confirmed: that ICWA applies to all cases where an American Indian/Alaska Native child is involved in a child custody proceeding. The proposed regulations mirror the overwhelming trend in state legislatures and courtrooms and make this clarification.
- **Providing notice to tribes in voluntary cases.** By providing notice, this ensures tribes will be able to assert their jurisdiction (which may be exclusive) and/or intervene in the case if necessary. Notice to the tribe is critical if the state court is to confirm (as it is required to do) whether the child is an Indian child and covered by ICWA. Again here, such notice affirms placement stability for the child.
- **Defining active efforts to prevent the breakup of Indian families and efforts to rehabilitate parents so that the child can be safely returned home and requiring that such efforts begin immediately.** This provision is vitally important to keep Indian children together with their families, a central and critical purpose of ICWA and child welfare law generally. Without a clear definition of how to measure these active efforts

to keep children with family and out of foster care, state and private agencies have not had a clear understanding of the level and types of service interventions required. The regulations provide not only a clear definition of active efforts but illustrative examples to guide state and private agencies practice with American Indian and Alaska Native children and their families.

- **Limiting the discretion of state courts to deny transfer of a case to tribal court.** The regulations make clear that it is not appropriate for state courts to refuse to transfer a case to tribal court because of their concern that a tribal court will make a decision with which they disagree.
- **Requiring a diligent search for placements within ICWA’s placement preferences (relatives, tribal families, and other Indian families) and notification to these prospective placement resources.** The designation of these resource families is similar to that required under the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P. L. 110-351) that requires relatives be notified when a child enters care of their opportunity to be engaged in the child’s life. This is a critical step in maintaining family connections.
- **Emphasizing the need to follow the placement preferences and limiting the ability of agencies to deviate from them.** The failure of state courts and agencies to place Indian children in relative, tribal and Indian homes is one of the biggest problems with the Act’s implementation. Keeping children with their families and within their tribal communities and cultures is vitally important to the children’s well-being and a central purpose of ICWA. However, today more than 50 percent of American Indian/Alaska Native children adopted are placed in non-Indian homes.
- **Assisting adult adoptees to secure information from their birth records.** This provisions will help make amends to children adopted outside of their tribal connections and help them reconnect to their culture and establish their rights as tribal citizens.

The Children’s Defense Fund believes that ICWA provides a strong legal basis for regulatory action. It states clearly that the Secretary of the Department of the Interior “shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act” (25 U.S.C. § 1952), which is a broad grant of authority. The Act was designed to establish “minimum federal standards” governing state court proceedings. In the last 35 years, however, there have been divergent interpretations of a number of ICWA provisions by various state courts and uneven implementation by state agencies. This undermines ICWA’s purpose to create consistent minimum federal standards. In addition, case law decided since 1979 supports the exercise of regulatory authority by the BIA.

CDF strongly supports the proposed regulations and urges you in the final regulations to reinforce the rationale for the authority to regulate and to highlight the substantive and legal rationale for specific regulations. We also encourage the Bureau of Indian Affairs to expand upon the Supreme Court’s ruling in the *Adoptive Couple v. Baby Girl* case so as to: 1) clarify that the opinion should not be applied outside of the private adoption context; and 2) provide guidance on how the Supreme Court interpretation of the law should be effectuated in state court and agency practice.

The high standards recommended for American Indian/Alaska Native children under ICWA are consistent with the treatment we believe should be expected for all children at risk of placement or in a range of foster care settings. They can help reinforce where that bar must be set to adequately protect and improve outcomes for all children in care. ICWA, when properly followed, ensures children are maintained safely with their families and not unnecessarily placed in foster care, increases appropriate placements and placement stability for children, and seeks to return children promptly to their families or find new permanent families for children that respect the child's culture.

The Children's Defense Fund thanks you for the opportunity to comment on these important regulations. We strongly urge you to adopt the proposed regulations to ensure that the Indian Child Welfare Act fulfills its essential purposes of protecting the rights of Indian children by supporting their families, and tribes. Safety, permanence and well-being must be the goal we set for all children.

We would be happy to discuss any of our comments in further detail.

Sincerely yours,



MaryLee Allen,
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